determining whether a BOC has complied with conditions in § 271). Section 271 repeatedly addresses the Commission's duties, and identifies only a single, derivative responsibility for state commissions. *Compare* 47 U.S.C. § 271(d)(3), (4), (6) *with id.* § 271(d)(2)(B) ("the Commission shall consult with the State commission of [that] State" so that the Commission (not the state commission) can "verify the compliance of the Bell operating company with the requirements of [§ 271(c)]"). Although a number of CLECs argue that states are authorized to regulate 271 elements, they address none of this and simply repeat the erroneous arguments CLECs' raised in response to BellSouth's petition for preemption of the Tennessee state commission (WC Docket No. 04-245). *See, e.g.*, Alpheus at 83-87; Loop & Transport at 126-35, 138-42; ATX *et al.* at 53-57. Verizon has addressed those claims at length in its comments here and in that proceeding. *See* Verizon Comments at 120-24; Comments of Verizon, WC Docket No. 04-245 (FCC filed July 30, 2004); Reply Comments of Verizon, WC Docket No. 04-245 (FCC filed Aug. 16, 2004).

2. The Commission has also ruled that *federal* law — namely, § 201 and § 202 — establishes the standards that BOCs must meet in offering access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *see also USTA II*, 359 F.3d at 588-90. Interpreting that federal law standard, the Commission has held, moreover, that "TELRIC pricing" or other "forward-looking pric[ing]" for 271 elements would be "counterproductive" and is "no[t] necessary to protect the public interest." *Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 473. Instead, § 201 and § 202 require nothing more than that "the market price should prevail" — "as opposed to a regulated rate." *UNE Remand Order* ¶ 473. That determination preempts any contrary attempts by states to require forward-looking pricing for

271 elements. *See, e.g., City of New York v. FCC*, 486 U.S. 57, 64 (1988). In addition, state regulation of 271 elements is preempted more generally because it is inconsistent with the Commission's determination (affirmed by the D.C. Circuit) that § 201 and § 202 establish the standard for assessing the rates, terms, and conditions on which BOCs provide access to 271 elements. The "patchwork contracts" that would result from state-by-state regulation of 271 elements conflicts with § 201 and § 202. *Boomer v. AT&T Corp.*, 309 F.3d 404, 418-20 (7th Cir. 2002). Although CLECs claim that 271 elements should be provided at TELRIC rates, they offer no reason for the Commission to revisit its determination that such rates would be "counterproductive" and are "no[t] necessary to protect the public interest." *Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 473; *see also* AT&T at 175-82; Loop & Transport at 126-35; Sprint at 67; Alpheus at 82-83; Integra at 38-40; ATX *et al.* at 52-53.

V. WHERE THE COMMISSION DOES NOT FIND IMPAIRMENT FOR PARTICULAR NETWORK ELEMENTS, IT SHOULD ADOPT RULES THAT PROVIDE FOR A PROMPT MOVE TO A LAWFUL REGIME AND THAT CONFIRM THAT COMMERCIAL AGREEMENTS FOR THE PROVISION OF SUCH NETWORK ELEMENTS ARE NOT GOVERNED BY § 252

A. The Commission Must Exercise Its Authority To Correct the Effects of Its Prior Unlawful UNE Rules

1. It is imperative that the Commission not only apply a lawful impairment standard, but also adopt rules that promptly move the market from the prior, unlawful regime of maximum unbundling to a lawful regime wherever the Commission does not find that competitors would be impaired without UNE access to a particular network element. Any such rules, moreover, must consist of two parts.

First, the Commission must immediately prevent CLECs from adding new UNEs, whether for their current customers or for new customers. The Commission has no authority to order unbundling without a finding of impairment and permitting CLECs to order new UNEs is not a "transitional" step *toward* the result mandated by the 1996 Act.

Second, for the embedded base of UNE arrangements, the Commission must provide for prompt increases to lawful rates — resale for switching, special access (including any volume and term discounts) for high-capacity facilities — or to negotiated rates as part of commercial agreements.[206] If the Commission has concerns about moving from UNE rates to lawful rates in a single step, the Commission could provide for the increase to occur in, for example, three increments. But the initial increment must apply immediately, to provide the incentive both to begin and to complete promptly negotiations for alternative commercial arrangements. A lengthy transition period will simply encourage CLECs to delay commercial negotiations for as long as they can obtain access to ILEC facilities at below-market rates.

The CLECs, unsurprisingly, propose multi-year transitions, with no limitation on new UNEs, and price increases postponed for a year or more. *See, e.g.*, AT&T at 205-07; Alpheus at 59, 65; MCI at 121-23; NARUC at 2-3; Loop & Transport at 151-56; ALTS *et al.* at 71, 84-85; PACE *et al.* at 93-97, 106-12; ATX *et al.* at 61-63.[207] But these proposals ignore that such a prolonged move to a lawful unbundling regime will also delay the benefits to competition, consumers, and the economy as a whole that will result from the elimination of UNE obligations

[206] Since October 4, 2004, when Verizon filed its comments, it has entered into a commercial agreement with InterGlobe Communications, Inc.

[207] At least one CLEC relies on the Commission's three-year transition regime for line sharing, *see* Alpheus at 64, but the fact that ILECs did not challenge that transition does not render it a lawful model for other transition regimes. Indeed, because the Commission mandated that ILECs permit CLECs to obtain new line sharing arrangements for a year (albeit at an increased rate) and maintained existing arrangements at TELRIC rates indefinitely, *see Triennial Review Order* ¶¶ 264-265, that arrangement was unlawful for the reasons discussed above.

where the Commission does not find impairment. As the Ad Hoc Telecommunications Manufacturing Coalition explains, elimination of the obligation to provide UNE-P and high-capacity UNEs will yield "dramatic[]" increases in "ILEC capital spending" and "CLEC capital spending" that "will give a substantial boost to the U.S. economy as a whole by helping the telecom manufacturing industry." Manufacturing Coalition at 9-10; *id.* at 10-11 (projected creation of 1 million new jobs from elimination of UNE requirements). And Renaissance Integrated Solutions, which this Commission has recognized is simultaneously "repairing failing sewer systems" and deploying "ubiquitous fiber optic conduit" that "effectively facilitate[s] a[n] FTTH system" to "every building,"[208] says the same thing. Even though its technology makes it "plainly economic for competitors . . . to deploy fiber using the[se] conduits," competitors had relied on the existence of UNE high-capacity facilities "as an excuse not to seek viable and economical alternative access solutions," but its negotiations with competitors have "progressed substantially" since June 2004. Renaissance Reply at 6.

As the D.C. Circuit has recognized, these companies have everything to gain from new investment and everything to lose when it does not materialize. They "sell goods and services that are inputs to the production and use of [telecommunications] services," and they "stand to gain [from] an expanding market," such as would result from regulatory decisions that provide the incentive for incumbents and new competitors alike to invest in, and compete using, their own state-of-the-art facilities. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (emphasis omitted). Accordingly, they have "the incentive to make a completely unbiased judgment on the matter." *Id.* The attached declaration of Doctors Kahn and Tariff

[208] Fourth Report to Congress at 18, *Availability of Advanced Telecommunications Capability in the United States* (FCC Sept. 9, 2004).

confirms what these manufacturers' experience reveals — UNEs discourage both incumbents and competitors from making economic investments that benefit consumers and the economy as a whole. *See* Kahn/Tardiff Reply Decl. ¶¶ 3, 6-7, 16-18, 20.

Nor can the CLECs' multi-year proposals be justified based on supposed reliance interests. Incumbents have repeatedly and successfully challenged the Commission's unbundling rules since they were first promulgated. In such circumstances, where an agency's rules "had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities," "reliance is typically not reasonable." *See Verizon*, 269 F.3d at 1110. CLECs, moreover, have known since March 2004 that the Commission's rules were vacated and might not be reinstated. CLECs, therefore, should have been using the past seven months — and some have — to pursue alternative, lawful means of serving their customers. The Commission should not reward those CLECs that have stubbornly refused to do so and that intend to cling to UNEs to the very end.

Finally, the CLECs' proposals proceed from a fundamental misunderstanding of the purpose of rules moving from an unlawful to a lawful unbundling regime. The goal of any such rules, no different from the 1996 Act itself, is to promote competition and benefit consumers, not particular competitors. Yet the CLECs operate on the assumption that each CLEC has the right to keep any customer it "won" using UNEs until that particular CLEC is capable of serving or chooses to serve those customers without UNEs. But there is no reason to guarantee that CLECs will keep their customers during the move to a lawful unbundling regime or to give CLECs a built-in advantage over competitors that are not relying on UNEs and the ILECs. On the contrary, prompt elimination of previously imposed unbundling requirements will give CLECs the incentive to enter into commercial agreements or to pursue alternative modes of serving their existing customers, thereby ensuring a level playing field for all competitors and, thereby, bringing consumers and the economy the benefits of competition.

2. The Commission has, and under the circumstances presented here must exercise, its clearly established authority to correct the consequences of its vacated unbundling rules. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals"). Thus, where the Commission does not make a finding of impairment and therefore cannot reinstate a vacated UNE rule, the Commission should make clear that change-of-law (or other) provisions in an interconnection agreement cannot be used to impede or negate the Commission's determinations that incumbents are not required to provide certain elements as UNEs under § 251(c)(3). Indeed, forcing incumbents to go through a "change of law" renegotiation process before they could cease providing UNEs for which the Commission has not found impairment or otherwise declined to require unbundling would merely be an unlawful means of perpetuating the Commission's prior unlawful unbundling requirements indirectly.

As we have previously explained at some length,[209] this is particularly true where, as is the case with the vast majority of Verizon's interconnection agreements, CLECs signed agreements that expressly provide that nothing more than formal notice is required in the event

[209] *See* Verizon Comments at 131-32; Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (July 28, 2004); Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (Aug. 20, 2004).

that any unbundling requirements are eliminated, including as a result of any judicial or regulatory decision. But, as we have previously explained, it is true as well for agreements that are ambiguous on this score or that contain only a generic change-of-law provision. To begin with, most agreements merely state that Verizon will provide UNEs to the extent required by law. Once the Commission's unbundling rules are vacated, or where the Commission does not decide to impose (or reimpose) unbundling requirements, then Verizon is no longer required by law to provide those elements as UNEs. Moreover, even if any agreements did state simply that particular UNEs are to be provided, that is merely a function of what the Commission's rules had required to be unbundled unlawfully. And the effect of those unlawful rules cannot be indefinitely perpetuated by forcing incumbents to go through some lengthy state change-of-law proceeding. Because the Commission's prior UNE rules have been repeatedly vacated, if the Commission does not find impairment or does not require unbundling now, it will not have changed the law, and any new, lawful rules that likewise do not require unbundling do not qualify as a change of law for purposes of any "change of law" provisions in interconnection agreements.

No commenter seriously disputes the Commission's "authority to take action" — even "action that is not expressly authorized by statute" — "in order to ensure that parties injured by [a] judicially invalidated order receive adequate relief." Order, *Qualcomm Inc. Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals*, 16 FCC Rcd 4042, ¶ 18 (2000). And given that the Commission, in the *Interim Order*, nullified provisions of existing interconnection agreements based on the mere possibility that it would reimpose UNE obligations, it would be arbitrary and capricious for the Commission to refuse to issue clear rules confirming that interconnection agreement provisions cannot prolong UNE obligations when the Commission has not reimposed them.

AT&T, however, suggests that the principle set forth in *Callery* does not apply here because the "change of law provisions do not *implement* the [Commission's] prior unbundling rules." AT&T at 202.[210] But the D.C. Circuit has previously held that there is "no such limitation on the *Callery* principle," under which an agency is "authori[zed] to correct its legal errors." *Natural Gas*, 965 F.2d at 1073. Indeed, AT&T's claim "reduces to the assertion that the agency may not retroactively correct its own legal mistakes, even when those missteps have been highlighted by the federal judiciary. *But this is not the law.*" *Verizon*, 269 F.3d at 1111 (emphasis added). The Commission is thus authorized, as necessary, to override any provisions of interconnection agreements — whether substantive provisions reflecting those vacated rules or change-of-law provisions — that could be argued to preserve unbundling requirements based on those vacated rules and that the Commission has not reimposed.

3. Finally, the Commission must take steps to preclude state commissions from attempting to forestall the implementation of the Commission's rules for moving to a lawful unbundling regime. Past experience shows that CLECs will raise — and many state commissions will prove receptive to — every conceivable argument in an effort to prolong Verizon's obligation to provide UNEs at TELRIC rates notwithstanding this Commission's

[210] AT&T also argues at length that the Commission cannot rely on the *Mobile-Sierra* doctrine as a basis for negating terms of interconnection agreements. *See* AT&T at 196-203. As shown above, *Callery* provides the Commission with sufficient authority to correct the consequences of its past legal errors. There is no need to rely on *Mobile-Sierra*. But in any event, AT&T is wrong — in the exceptional circumstances presented here, the *Mobile-Sierra* doctrine also permits the Commission to negate any provisions of interconnection agreements that could be construed to impede a prompt move to a lawful unbundling regime. *See* Verizon Comments at 134-35.

findings. The Commission must make clear, however, that any such arguments — however imaginative — provide no basis for state commissions to override or ignore the Commission's determinations eliminating or limiting UNEs — even on an interim, temporary, or "status quo" basis.

For example, AT&T argues here — as it has before numerous state commissions — that Verizon is obligated to provide mass-market switching and high-capacity facilities as UNEs no matter how the Commission rules here, based on a merger condition applicable to Verizon. *See* AT&T at 182-87.

This issue is also pending before the Commission with respect to the *Bell Atlantic-GTE Merger Order* (CC Docket No. 98-184),[211] where Verizon has explained in detail why AT&T's claims, recently echoed by other CLECs, are erroneous.[212] As Verizon has explained there, and briefly summarizes below, the Commission must find that Verizon's obligations under the merger condition at issue expired more than eighteen months ago and that Verizon is not, as these CLECs contend, still bound by the UNE rules adopted in the *UNE Remand Order* and the *Line Sharing Order*.[213]

The relevant merger condition provides:

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[211] Memorandum Opinion and Order, *Application of GTE Corporation and Bell Atlantic Corporation for Consent To Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

[212] *See* Comments of Verizon on Petition for Declaratory Ruling, CC Docket Nos. 98-141 & 98-184 (FCC filed Oct. 4, 2004); Reply of Verizon to AT&T Comments, CC Docket No. 98-184 (FCC filed Aug. 10, 2004).

[213] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

> Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combinations required in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (UNE Remand Order) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (rel. Dec. 9, 1999) (Line Sharing Order) in accordance with those Orders **until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area**. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.

Bell Atlantic/GTE Merger Order App. D, ¶ 39 (emphasis added). There can thus be no dispute that, after "a final, non-appealable judicial decision" providing that a particular "UNE or combination of UNEs is not required to be provided," Paragraph 39 imposes no further obligation.

USTA I was just such a judicial decision. In that case, the D.C. Circuit vacated both the *UNE Remand Order* and the *Line Sharing Order*, the effect of which was to eliminate ILECs' obligation to comply with the unbundling rules established in those orders. *See Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) ("To 'vacate' . . . means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.' ") (internal quotation marks omitted).[214] Accordingly, the

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[214] *See, e.g., Triennial Review Order* ¶ 31 ("[T]he D.C. Circuit *vacated* . . . the portions of the Commission's *UNE Remand Order* that . . . established a list of mandatory UNEs.) (emphasis added); *see also id.* ¶ 705 (in light of the order of vacatur, "the legal obligation [to provide access to UNEs and UNE combinations] upon which . . . existing interconnection agreements are based . . . no longer exist[ed]").

decision *was* a determination that those UNEs and UNE combinations are "not required to be provided" anywhere in the country. The Supreme Court's denial of certiorari rendered that determination final and non-appealable. At that point, the Commission could adopt new unbundling rules, but its prior rules, and the obligations they imposed, were eliminated.[215]

The Common Carrier Bureau has already held that the vacatur of the FCC's rules would eliminate Verizon's obligation under Paragraph 39, clarifying that this paragraph imposes an obligation on Verizon "to comply with certain Commission rules 'until the date of any final and non-appealable judicial decision' concluding the litigation concerning those rules *by invalidating them*," such as by a "a final decision of the Supreme Court . . . denying certiorari outright or . . . invalidating given . . . rules."[216]

The denial of certiorari in *USTA I* terminated Verizon's obligation under Paragraph 39 for an additional reason: the merger condition provides that its provision "shall become null and void and impose no further obligation" after "the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively." There can

[215] AT&T contends that two federal district courts have rejected the claim that the Supreme Court's denial of certiorari in *USTA I* eliminated the obligation in Paragraph 39. *See* AT&T at 185. Neither case held any such thing. In fact, *Michigan Bell Telephone Co. v. Chappelle*, 222 F. Supp. 2d 905 (E.D. Mich. 2002), was issued months before the Supreme Court denied petitions for certiorari in *USTA I* and never mentions that decision. In addition, that case involved not only merger conditions applicable to SBC, but also a condition specifically related to shared transport, which has no analog in the *Bell Atlantic/GTE Merger Order*. *See id.* at 911. The other case that AT&T cites, *Wisconsin Bell, Inc. v. AT&T Communications of Wisconsin, LP*, No. 03-C-671-S (W.D. Wis. July 1, 2004), likewise addresses only the shared transport condition. In any event, in the single sentence in that opinion addressing the merger condition, the court held that the shared transport condition would expire when "*USTA II* becomes final and non-appealable," *id.* at 17, which occurred on October 12, 2004.

[216] Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, to Michael Glover, Verizon Communications Inc., *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 18327, 18328 (2000) (emphasis added) (quoting *Bell Atlantic/GTE Merger Order* ¶ 316).

be no dispute that the *UNE Remand Order* and *Line Sharing Order* are final orders that are now non-appealable. Accordingly, there are, without question, "final and non-appealable Commission orders" in both proceedings, and Paragraph 39 is therefore without further effect.[217]

In arguing that Paragraph 39 imposes continuing obligations, AT&T relies on Paragraph 316 of the *Bell Atlantic/GTE Merger Order*. *See* AT&T at 184. As an initial matter, it is Paragraph 39 of the conditions, not Paragraph 316 of the order, that contains the binding obligation. Paragraph 316 reflects the FCC's "summar[y] [of] the conditions" and does not set forth the terms of the conditions themselves. *Bell Atlantic/GTE Merger Order* ¶ 249; *see id.* ¶ 250 n.563 ("The specific conditions that we adopt in th[e] merger proceeding are set forth in Appendix D to this Order.").[218] In any event, the Commission did not there suggest that Paragraph 39 would continue to apply until all litigation concerning any Commission unbundling rules is concluded. The reference to "subsequent proceedings" in Paragraph 316 does not modify the type of "judicial decision" that would put an end to Verizon's obligations. Instead, the Commission acknowledged that even if the D.C. Circuit had never vacated the *UNE Remand Order* and *Line Sharing Order*, a subsequent final and non-appealable *FCC* order on any subject

[217] In accordance with the terms of the *Bell Atlantic/GTE Merger Order*, an independent auditor has verified in its report to the Commission that the obligations imposed under paragraph 39 of the merger conditions expired on March 24, 2003. *See* Letter from Deloitte & Touche LLP to Marlene H. Dortch, Secretary, FCC, CC Docket No. 98-184 (Oct. 17, 2003). The auditor's conclusion on this score thus provides additional support for the conclusion that Verizon's obligations terminated with the denial of certiorari in *USTA I*.

[218] In analogous circumstances, the FCC has rejected the claim that the FCC's "attempt to describe, in summary fashion, the obligations imposed by the relevant portion of" a condition of a merger "function[s] as an additional, independent Commission-imposed condition." Order, *Texas Networking, Inc. Petition for Declaratory Ruling and Complaint*, 16 FCC Rcd 17898, ¶ 7 (Chief, Cable Services Bureau 2001). Instead, the condition "itself must be looked to when determining its specific content." *Id.*

within the scope of Paragraph 39 would put an end to the corresponding obligation under the merger conditions (whether the order eliminated the condition or not).[219]

Even aside from the fact that the Supreme Court's denial of certiorari with respect to *USTA I* terminated the obligations imposed in Paragraph 39, those obligations would have terminated *in any event* a few months later. Like virtually all of the merger conditions, Paragraph 39 was to sunset as of June 30, 2003 — 36 months after the Bell Atlantic-GTE merger closed. The merger conditions contain a generally applicable sunset clause, which provides that, "[e]xcept where other termination *dates* are *specifically established* herein," "*all* Conditions . . . shall cease to be effective and shall no longer bind Bell Atlantic/GTE in any respect 36 months after the Merger Closing Date." *Bell Atlantic/GTE Merger Order* App. D, ¶ 64 (emphases added). While a handful of the merger conditions contain such "specific[]" sunset dates — for example, the obligation to provide uniform systems in Pennsylvania and Virginia lasts for "5 years after the Merger Closing Date"[220] and the obligation for long-distance retail pricing lasts "36 months after Bell Atlantic is authorized to provide interLATA services"[221] — Paragraph 39 does not contain a specific date *after* the general sunset date. Instead, Paragraph 39 makes reference to a specific event that could — and, in fact, did — terminate Verizon's obligations

[219] If AT&T's interpretation were correct, the Commission's reference to "subsequent proceeding" in paragraph 316 would be inconsistent with the language of the merger condition itself and, therefore, trumped by that condition. The condition refers specifically to "the UNE Remand and Line Sharing proceedings" and *not* to any subsequent proceedings. In all events, the Commission need not address the issue, because the final and non-appealable decision in *USTA I* put an end to any obligation under Paragraph 39, irrespective of whether the condition is "null and void" because of the issuance of a final FCC order.

[220] *Bell Atlantic/GTE Merger Order* App. D, ¶ 19f.

[221] *Id.* App. D, ¶ 49b.

under that paragraph *before* 36 months had elapsed. AT&T ignores all of this in arguing that the sunset provision is inapplicable to Paragraph 39. *See* AT&T at 184.

B. Commercial Agreements That Do Not Relate to Unbundling Obligations Under § 251(c) Are Not Subject to the Requirements of § 252

During and after the move to a lawful unbundling regime, incumbents and competitors will be able to negotiate reasonable commercial terms for the provision of network elements that incumbents have no obligation to provide as UNEs. *See* Verizon Comments at 138; *see also* Kahn/Tardiff Decl. ¶ 10. The Commission has already held, and should reconfirm here, that such agreements are *not* subject to the negotiation, arbitration, filing, and opt-in requirements of § 252. Instead, as the Commission has held, the various provisions of § 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)." *Qwest Declaratory Ruling*[222] ¶ 8 n.26.[223] The Commission later reiterated that only "agreement[s] relating to the duties outlined in sections 251(b) and (c) fall[] within section 252(a)'s filing requirement." *Qwest NAL* ¶ 23. The Commission's ruling follows directly from the text of

[222] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

[223] The only CLEC commenters to address this statement by the Commission assert that Verizon has "taken [it] entirely out of context." Loop & Transport at 162-63. This is nonsense. In the text attached to the footnote, the Commission stated that an "interconnection agreement that must be filed pursuant to section 252(a)(1)" is an agreement that "creates an *ongoing* obligation pertaining to" any of the "interconnection *obligations listed in section 251* of the Act." *Qwest Declaratory Ruling* ¶ 8; Notice of Apparent Liability for Forfeiture, *Qwest Corporation Apparent Liability for Forfeiture*, 19 FCC Rcd 5169, ¶ 22 n.70 (2004) ("*Qwest NAL*") (emphasis added). In the footnote, the Commission then explains that, for this reason, it rejected claims requiring the filing of *all* agreements between an incumbent LEC and a requesting carrier." *Qwest Declaratory Ruling* ¶ 8 n.26. Instead, "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)." *Id.*

§ 252, which is triggered by "a request for interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. § 252(a)(1) (emphasis added). Negotiations over the terms and conditions on which an incumbent will provide network elements that are not UNEs are not "pursuant to" section 251. Any other result, moreover, the Commission stressed, would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Qwest Declaratory Ruling* ¶ 8.

A number of commenters contend that "all agreements that involve local interconnection must be filed" with state commissions. Loop & Transport at 159; *see id.* at 156-66; MCI at 174-83; ADT at 6-10; PACE *et al.* at 115-19.[224] In making this argument, they rely on § 252(e)(1), which provides that "[a]ny interconnection agreement adopted by negotiation . . . shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). This section, however, does not state that "[v]oluntary agreements are to 'be submitted to the State commission'" as MCI and others claim. *E.g.*, MCI at 175. Instead, § 252(e)(1) — no different from the rest of § 252 — applies only to "interconnection agreement[s]." And, as the Commission has already held, an agreement is not an interconnection agreement for purposes of § 252 unless it "contain[s] an ongoing obligation relating to section 251(b) or (c)." *Qwest Declaratory Ruling* ¶ 8 n.26.[225] An agreement containing rates, terms, and conditions for network elements that are

[224] These commenters, however, do not claim that state commissions would have the authority to arbitrate the terms of such agreements if parties reach impasse in their commercial negotiations.

[225] MCI relies on the provision in § 252(a)(1) requiring the filing of "any interconnection agreement negotiated before February 8, 1996," claiming that agreements that do not implement § 251(b) or (c) can still be interconnection agreements under § 252. MCI at 180. In fact, this provision confirms the Commission's interpretation of § 252 in the *Qwest Declaratory Ruling*. If MCI were correct that all voluntary agreements relating to local interconnection must be filed

not UNEs imposes obligations entirely unrelated both to § 251(c)(3) — which applies only to UNEs — and to every other subsection of § 251(b) or (c).[226]

Nothing in the recent decision of a Texas district court regarding an agreement between SBC and Sage Telecom is to the contrary. *See Sage Telecom, LP v. Public Util. Comm'n*, No. A-04-CA-364-SS (W.D. Tex. Oct. 7, 2004). In that case, the court expressly found that, because there was no dispute that the agreement at issue "fulfill[ed] at least two of SBC's duties under § 251," it "need not address" the question whether "the 'interconnection agreement' referred to in § 252(e)(1) should be limited to agreements that . . . address an ILEC's § 251(b) and (c) duties." *Id.*, slip op. at 6, 8 n.2. The Commission, however, has already resolved that question, holding in the *Qwest Declaratory Ruling* and reaffirming in the *Qwest NAL* that only "agreement[s] relating to the duties outlined in sections 251(b) and (c) fall[] within section 252(a)'s filing requirement." *Qwest NAL* ¶ 23; *see Qwest Declaratory Ruling* ¶ 8 n.26. The federal court, moreover, held that the only agreements that "must be filed" are those that "qualify as interconnection agreements within the meaning of the Act." *Sage Telecom*, slip op. at 10. Because, as explained above, a commercial agreement pertaining to network elements that are

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under § 252, then Congress would not have needed to adopt a special rule for agreements negotiated before the 1996 Act took effect.

[226] Such an agreement is not negotiated "without regard to the standards set forth in" § 251(c)(3), as some commenters claim. 47 U.S.C. § 252(a)(1); *see* Loop & Transport at 159. When an element is not a UNE, § 251(c)(3) does not speak to that element at all. Negotiations about such elements, therefore, are not "without regard" to standards in § 251(c)(3). Instead, § 252(a)(1) ensures that, if a CLEC is not interested in asserting its right to obtain an element that is a UNE or wants to bargain away that right for some other concession, that federal law does not require the ILEC to provide that UNE notwithstanding the parties' wishes.

not UNEs is not an "interconnection agreement[] within the meaning of the Act," it need not be filed under § 252.[227]

VI. THE COMMISSION SHOULD CLARIFY ITS UNBUNDLING RULES SO AS TO REMOVE DISINCENTIVES TO THE DEPLOYMENT OF BROADBAND FACILITIES

The *Triennial Review Order* "eliminate[d] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.* ¶ 4. The Commission sought to give ILECs the "*certainty* that their fiber optic and packet-based networks will remain free of unbundling requirements," in order to promote deployment of fiber-optic and packet-based networks by ILECs and CLECs alike. *Id.* ¶ 272 (emphasis added). But the rules issued by the Commission do not provide, in certain respects, the desired *certainty* that next-generation broadband networks will remain free from unbundling obligations.

To provide the desired certainty, the Commission can take three important steps in this and other proceedings. First, the Commission should grant Verizon's pending petition for forbearance from any unbundling obligation for broadband network elements that § 271 may be

[227] To the extent the court stated, in *dicta*, that "the types of agreements subject to the State commission approval requirements of § 252(e)(1) are not limited to agreements made pursuant to the § 252(a)(1) scheme," *Sage Telecom*, slip op. at 7, the court erred. As explained above, every provision of § 252 applies only to "interconnection agreements," which are agreements entered into through the § 252 negotiation and arbitration process and "contain an ongoing obligation relating to section 251(b) or (c)." *Qwest Declaratory Ruling* ¶ 8 n.26. The court, however, erroneously thought it relevant to the proper interpretation of § 252(e)(1) that the section "requires the submission not only of voluntarily negotiated § 252(a)(1) agreements, but also arbitrated § 252(b) agreements." *Sage Telecom*, slip op. at 7. But § 252 makes clear that arbitration under § 252(b) can occur only after negotiation under § 252(a)(1) reaches impasse — they are not independent routes to creating an interconnection agreement. *See* 47 U.S.C. § 252(b)(1) (petition for arbitration may be filed 135 to 160 days after ILEC "receives a request for negotiation under this section," that is, § 252(a)(1)).

construed to impose. Second, the Commission should eliminate the distinction between mass-market and enterprise-market customers for purposes of its broadband unbundling rules or, failing that, should clarify which customers are in the mass market for purposes of those rules. Third, the Commission should confirm that it will not reconsider its decisions not to require mandatory line sharing (including the limited form of line sharing some CLECs refer to as a "VoIP hot-cut") and not to unbundle the broadband, packetized capacity of hybrid loops.

A. The Commission Should Forbear from Any Unbundling Obligation for Broadband Network Elements That Section 271 May Be Construed To Impose

Making it clear that Verizon and other BOCs need not unbundle their broadband networks under § 271, just as the Commission already determined they need not be unbundled under § 251, is the single most important step the Commission can take to promote widespread broadband deployment. Verizon has a pending petition for forbearance on this topic, which the Commission should grant promptly.[228] In its various filings in support of its petition, Verizon has explained in considerable detail the legal and policy reasons why the requested forbearance is appropriate, and it will not repeat all of those reasons here. In brief, the Commission recognized in the *Triennial Review Order* that it could not apply § 251 unbundling obligations to certain broadband-specific elements, given that the broadband market is already subject to intense intermodal competition, that CLECs can and do offer broadband services without access

[228] *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338 (FCC filed July 29, 2002); Ex Parte Letter from Susanne Guyer, Verizon, to Michael Powell, Kathleen Abernathy, Kevin Martin, Michael Copps, and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338 (Oct. 24, 2003) (withdrawing the request for forbearance with respect to *narrowband* elements); *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) (requiring the Commission to "grant Verizon's petition for forbearance or to provide a reasoned explanation for denying it").

to those elements, and that unbundling obligations are inimical to the prospects for further broadband investment. A finding that broadband unbundling obligations persist under § 271 after they have been eliminated as anti-investment and anti-consumer under § 251 is a reason to grant forbearance from those obligations under all three criteria of § 10(a). Such unbundling obligations, no matter what their statutory provenance, would thwart the Commission's goal under § 706 of ensuring a wireline broadband alternative to cable modem service, which increasingly occupies "a leading position in the [broadband] marketplace." *Triennial Review Order* ¶ 292.

Some commenters have suggested that the Commission lacks authority to forbear from the unbundling obligations for loops, transport, switching, and signaling because these items appear in the § 271 competitive checklist, and § 271(d)(4) provides that the Commission may not "limit or extend the terms used in the competitive checklist."[229] As Verizon has previously explained, that argument is untenable.[230] Section 10 grants the Commission broad authority to forbear from applying "*any* provision of this [Act]." 47 U.S.C. § 160(a) (emphasis added). And § 10(d) specifically provides that the Commission must forbear from applying § 271 requirements if those requirements have been "fully implemented" and the three criteria for forbearance set forth in § 10(a) are satisfied. Section 271(d)(4), in contrast, speaks to a different set of issues: it directs the Commission to ensure full implementation of the checklist before granting a BOC application to provide long-distance service in a particular state, and it makes

[229] *See, e.g.*, American Discount Telecom *et al.* (a/k/a the "SAFE-T Joint Commenters") at 5-6; Sprint at 72-76.

[230] *See, e.g.*, Reply Comments of Verizon at 16-17, CC Docket No. 01-338 (FCC filed Nov. 26, 2003).

clear that the showing cannot be enlarged (or diminished) by the Commission. Once the required showing has been made, however, § 271(d)(4) is satisfied. Indeed, at that point, the checklist requirements have been "fully implemented" for purposes of § 10(d) and are thus eligible for forbearance under § 10(a). This reading places § 10 and § 271(d)(4) in harmony; the CLECs' contrary reading would place those provisions in needless contradiction.

B. Incumbents Should Have No Obligation To Unbundle New Broadband Facilities, Regardless of the Customers Served

In the *Triennial Review Order*, the Commission stated that it was adopting a bright line distinction between incumbents' existing legacy networks and their new broadband facilities. The Commission explained that, by providing certainty as to what the rules would be for these new broadband facilities, its rules would "provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities." *Id.* ¶ 213. To that end, the Commission made clear not only that FTTP networks are not subject to unbundling, but also that any transmission path over a fiber facility that is used to transmit packetized information is not subject to unbundling, without regard to the identity of the customer being served. *See id.* ¶ 288 (holding that it would "not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information").[231] These rules thus make clear

[231] *See also* Errata, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 19020, ¶¶ 37-38 (2003) (removing the word "residential" from the Commission's rules regarding "fiber-to-the-home loops"); *see also* Opposition of the FCC to Allegiance Telecom's Motion for Stay Pending Review at 13, *Allegiance Telecom, Inc. v. FCC*, Nos. 03-1316, *et al.* (D.C. Cir. filed Oct. 21, 2003) ("[N]othing in the Commission's discussion of FTTH loops indicates that the FTTH non-impairment finding was limited to residential end users," so the *Errata* "merely conformed the rule to the discussion in the text of the [*Triennial Review*] *Order*.").

that new FTTP deployments, such as those Verizon is rolling out, are not subject to an unbundling requirement, regardless of the speed of service offered and regardless of the customers served.[232]

The *Triennial Review Order*, however, created an ambiguity with respect to enterprise customers, by imposing a requirement to provide access to dark fiber without explaining how that rule is reconciled with the rules excluding new broadband facilities from unbundling requirements. *See Triennial Review Order* ¶¶ 311-314. Although the Commission's rules are therefore clear that FTTP facilities used to serve the mass market are not subject to a dark fiber unbundling requirement, *see* 47 C.F.R. § 51.319(a)(3) (no unbundling for FTTP loop "whether dark or lit"), they do not squarely address what the rule may be for customers classified as part of the "enterprise" market. While this will not be an issue in many instances — because fiber that is part of these new network deployments will be connected to opto-electronic equipment and therefore will not meet the definition of dark fiber — the Commission should eliminate any uncertainty in this regard to ensure that the investment incentives the Commission properly sought to foster are not undermined. Specifically, the Commission should make clear that facilities deployed as part of a generalized roll out of a next-generation, integrated, FTTP network are not subject to an unbundling requirement regardless of the customers served.

Such clarification is important for two reasons. First, small- and medium-sized businesses are entitled to the benefits that these new, advanced networks can provide. These

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[232] And the Commission has recently clarified that fiber-to-the-curb ("FTTC") loops also are not subject to unbundling. *See* Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 04-248 (rel. Oct. 18, 2004). To the extent Verizon discusses FTTP loops here, its arguments apply equally to FTTC loops.

businesses, moreover, are an important engine for economic growth. As a result, the availability of new, next-generation networks will benefit not only these customers, but also the broader economy. Accordingly, it is important for the Commission's rules to preserve incentives for carriers to serve these customers as part of a generalized roll out of next generation FTTP networks. Second, from a network perspective, imposing an unbundling obligation for some customers necessarily affects how incumbents plan and build their networks. In order to serve the affected customer segment, the significant inefficiencies and extra costs associated with any unbundling obligation would still have to be incurred, and incumbents still would be forced to undertake costly redesigns of the network and development of systems and procedures to address such customer-specific unbundling requirements. This is in addition to the reduced incentive to invest, as a result of the increased risks of deployment, that comes with the imposition of unbundling obligations. Incumbents, therefore, will be left with the choice of bypassing the customer segments subject to unbundling, or passing the additional costs and risks on to all customers. For both reasons, the Commission should confirm that FTTP facilities that are part of a generalized roll out are not subject to any form of unbundling obligation regardless of the specific customer served.

At a minimum, to the extent the Commission reimposes any dark fiber unbundling requirement — and, as explained above, it should not — it should make clear that it applies only where customers are purchasing a separate, customized network solution, rather than obtaining service through a generalized roll out of a next-generation FTTP network in a particular geographic area. This approach is consistent with the Commission's own analysis of the difference between enterprise and mass-market customers. The Commission has stated that, "[i]n the enterprise market, companies are able to target individual buildings and customers and determine which technology is the optimal means of reaching each customer," while, "in the mass market where revenues are small, customers are typically served in large groups, using uniform technologies and mass-marketing and provisioning techniques to minimize the cost of serving each customer." *Triennial Review Order* ¶ 309.

To the extent that the Commission retains a distinction between the enterprise customers and mass-market customers for any network architectures *other* than FTTP, the Commission also should clarify *which* customers count as enterprise customers.[233] The Commission should clarify that any customers with 48 or fewer telephone numbers are part of the mass market, for the reasons given in Verizon's opening comments. *See* Verizon Comments at 147. This test is easy both to apply and to verify, and it recognizes that competition to serve these customers is robust and increasing. *See id.* at 147-48 (collecting statistics); *see also 2004 Fact Report* at III-38, Table 19; *id.*, App. A at A-3 to A-5 & Table 3, A-8, Table 6.

C. The Commission May Not Lawfully Reintroduce Line Sharing

The Commission's decision not to require mandatory line sharing at UNE rates was correct both legally and factually. *See, e.g.*, Verizon Comments at 148. Nevertheless, a few parties persist in seeking reconsideration of the decision to eliminate line sharing. *See* Covad at 40-56; EarthLink at 4-10; ALTS *et al.* at 46-52. Yet the D.C. Circuit's mandate in *USTA I* and *USTA II* essentially forecloses the creation of a line-sharing UNE, because competitors cannot make the necessary showing of impairment once intermodal competition is taken into account.

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[233] The Loop and Transport CLEC Coalition asks the wrong question when seeking assurance that the Commission's broadband unbundling rules do not "eliminate" UNEs "used to serve enterprise customers." Loop & Transport at 150. The real issue is how to distinguish enterprise customers from mass-market business customers.

Furthermore, the pro-competitive effects that the Commission predicted have, in fact, materialized following the Commission's announcement of the elimination of line sharing. Prices have fallen while both deployment and subscribership have increased. As noted in Verizon's opening comments in this proceeding, even EarthLink — a major proponent of mandatory line sharing — has been compelled by events to admit publicly that "[t]he intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance."[234] Under these circumstances, the reimposition of line sharing would be illegal and unreasonable.

1. The Elimination of Line Sharing, As the Commission Predicted, Has Been Strongly Procompetitive

In the *Triennial Review Order*, the Commission found "the costs of unbundling the HFPL outweigh the benefits," as the availability of line sharing "skew[s] competitive LECs' incentives toward providing a broadband-only service to mass market consumers." *Id.* ¶¶ 261, 263. The Commission held further that reimposing line sharing "will encourage the deployment of new technologies providing the mass market with even more broadband options" and "greater product differentiation between the incumbent LECs' and the competitive LECs' offerings." *Id.* For these reasons, the Commission concluded that the elimination of line sharing "creates better competitive incentives than the alternatives." *Id.* ¶ 260. As Verizon demonstrated in its comments, these predictions have been borne out. Following the Commission's announcement of its decision, Verizon has invested heavily to increase the availability of DSL, while cutting

[234] EarthLink, Inc., Form 10-K at 10 (SEC filed Mar. 5, 2004) ("EarthLink Form 10-K").

prices and increasing download speeds. Cable companies have responded in kind, thus further benefiting consumers. *See* Verizon Comments at 150-52.

Moreover, claims that "[l]ine sharing was largely responsible for creating consumer broadband services" were always a myth. Covad at 46. The record here demonstrates that line sharing is not and never was a significant competitive factor in the marketplace and that the *elimination* of mandatory line sharing has benefited consumers. Verizon has submitted calculations based in part on the Commission's own statistics indicating that line sharing accounts for less than 1 percent of mass-market broadband lines.[235] In view of this minuscule market-share figure, the substantial costs associated with mandatory line sharing produced no meaningful pro-competitive benefits. The elimination of line sharing, by contrast, has produced substantial consumer benefits, which would be lost if the Commission were to reverse course.

Nor, as a matter of law, could the Commission reimpose line sharing because competitors plainly are not impaired without UNE access to the high-frequency portion of the loop. In *USTA I*, the D.C. Circuit chastised the Commission for failing to consider intermodal competition when it created the line-sharing UNE and vacated the Commission's decision. *See* 290 F.3d at 429. This D.C. Circuit holding was reiterated in *USTA II*. *See* 359 F.3d at 585 (noting that the Commission's reliance on the existence of "substantial intermodal competition" in the *Triennial Review Order* "follow[ed] our mandate in *USTA I*"). Indeed, so strong is the evidence of competition in the broadband market that even the D.C. Circuit observed that "intermodal competition in broadband, particularly from cable companies, means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be

[235] *See* Response of Verizon to Petitions for Reconsideration at 41-42, CC Docket Nos. 01-338, *et al.* (FCC filed Nov. 6, 2003).

vigorous competition from other sources." *USTA II*, 359 F.3d at 580. In such circumstances, the Commission cannot find impairment and, therefore, cannot order unbundling of the HFPL.

2. *The Arguments for the Reimposition of Line Sharing Are Contrary to Binding Judicial Precedent and the Record Evidence of Competition*

a. In arguing for the reimposition of line sharing, EarthLink and Covad invite the Commission to commit the very same error that led to vacatur in *USTA I*: to blind itself to the availability of intermodal competition. Covad in particular claims that, because cable companies and incumbent LECs create most of the competition in the broadband marketplace, the market amounts to an anticompetitive duopoly, and also that cable fails to serve small business customers. *See* Covad at 25-31. It is wrong on both counts, as is shown in detail in Appendix A to the *2004 Fact Report*, which provides an update on broadband competition.

The very studies on which Covad purports to rely actually undermine its arguments on this score. For example, Covad cites a Congressional Budget Office report for the proposition that duopolies can in some circumstances lead to "market failure."[236] But far from condemning the actual broadband market as "failure," the *very same report* expressly concluded that market for broadband "does not currently appear to need 'fixing.'"[237] The report continues:

> Consumers' preferences and income and the economic cost of providing the service largely hold sway and determine the number of broadband subscribers and the amount that they pay for service. The number of broadband customers is growing at a rapid pace, and current providers face the prospect of new broadband market entrants and other competitive pressures from converging telecommunications markets. Many of the problems that remain, such as uneven

[236] Covad at 30 (quoting Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?* at 1 (Dec. 2003) ("*CBO December 2003 Paper*")).

[237] *CBO December 2003 Paper* at 30.

> distribution and availability of broadband, are a function of the market's immaturity and not necessarily permanent features.[238]

Similarly misplaced is Covad's reliance on a snippet from a Yankee Group study in support of its argument that cable fails to serve the small business segment of the broadband market.[239] The cited study states merely that cable modem has not, contrary to earlier projections, "*surpass[ed]*" DSL with respect to small business customers with between 20 and 99 people.[240] But whether cable has surpassed DSL for this sub-submarket is a very different issue from whether cable provides a significant competitive alternative for these customers. And as the Yankee Group study finds, it clearly does. The study shows that DSL's share of these customers is less than 6 percentage points higher than cable's, and predicts that, "[b]y 2008, cable will gain share . . . closing the wide gap between the two broadband media."[241] Moreover, with respect to smaller businesses—those with fewer than 10 employees—the same study reiterates earlier findings that "cable modem and DSL maintained an equal share" of the market and that "cable operators have been extremely successful in serving businesses with 10 people or less."[242]

In short, when attempting to demonstrate that incumbent LECs have market power in the broadband market, Covad is long on rhetoric and short on facts. Furthermore, the Commission cannot reasonably conclude that competitors are impaired when, as in the broadband market today, alternative facilities are "significantly deployed on a competitive basis." *USTA I*, 290

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[238] *Id.*

[239] Covad at 27 (quoting Yankee Group, *Cable and DSL Battle for Broadband Dominance* at 4-5 (Feb. 2004) ("*Feb. 2004 Yankee Group Study*")).

[240] *Feb. 2004 Yankee Group Study* at 5 (emphasis added).

[241] *Id.*

[242] *Id.* at 6.

F.3d at 422. The Commission's own statistics show that more than 63 percent of residential and small business customers receiving 200 kbps service subscribe to cable modem, as opposed to just 34 percent that rely on DSL.[243] Of customers that receive more than 200 kbps in both directions, 85 percent use cable modem, while only 13 percent use DSL.[244] Simply put, local telephone companies are still secondary players in this competitive market; therefore, this is not a situation in which the *competitive context* — *i.e.*, the alternatives available *to consumers* — depends on access to ILEC facilities, and there is no possible basis for the Commission to conclude that competitors are "impaired" without line sharing. It would be arbitrary and capricious to regulate the second-place, non-dominant DSL providers more heavily than the dominant cable companies. Covad's claim (at 60) that "a refusal to reconsider these [broadband unbundling] decisions will deter the deployment of VoIP" simply ignores the fact that VoIP is being made available over alternative platforms already without any reliance on UNEs.

Although EarthLink claims that these alternative platforms — cable, wireless, satellite, and broadband over power line — are closed to unaffiliated ISPs, EarthLink itself has agreements in place with such varied broadband transmission providers as Time Warner, Comcast, and Bright House — not to mention BellSouth, SBC, Qwest, and Verizon — to use their networks to reach its customers.[245] And, despite EarthLink's protestations to the contrary, *see* EarthLink at 8-9, even if cable companies were to sell their broadband transmission capacity only to their own affiliated ISPs, their capacity would nevertheless be part of the same market as

[243] *See* Indus. Analysis & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Table 3 (June 2004).

[244] *See id.* at Table 4.

[245] *See* EarthLink Form 10-K at 6; EarthLink, Inc., Form 10-Q at 13 (SEC filed Aug. 9, 2004).

the broadband transmission services of telephone companies and would have to be taken into account in any impairment analysis.[246]

Furthermore, the continued availability of unbundled copper loops ensures that CLECs will be able to reach their customers over legacy ILEC facilities, and that their investment incentives will not be skewed toward a business model that uses only the high-frequency portion of the loop. *See Triennial Review Order* ¶ 261. Oddly, Covad and ALTS both cite, in support of their argument for continued mandatory line sharing at zero or near-zero cost, the Commission's finding that "requesting carriers are generally impaired on a national basis without access to incumbent LEC's local loops, whether they seek to provide narrowband or broadband services, or both." Covad at 41 (quoting *Triennial Review Order* ¶ 248); *see* ALTS *et al.* at 46 (same). But that impairment, if any, is remedied by unbundled access to the stand-alone copper loop, which all carriers continue to enjoy. And if it is broadband service that such competitors wish to provide, they also can deploy their own fiber loops, as the Commission has already determined that competitors have the same ability as incumbents to do so. *See Triennial Review Order* ¶ 315.

The CLECs' suggestion that many broadband customers prefer to keep ILEC voice service has no bearing on the question of impairment. *See* Covad at 42; ALTS *et al.* at 47-48.

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[246] *Cf.*, *e.g.*, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.31 (Apr. 1997) (relevant market includes "vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market."); *see generally* Ex Parte Letter from Dee May, Assistant Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-337, *et al.* (Nov. 13, 2003) (collecting authority and Commission precedent for including self-suppliers in the relevant market for transmission capacity).

As explained above, this "emphasis on consumer preference is economically irrelevant," because "[a]ttributes of [consumers] do not identify markets." *Menasha*, 354 F.3d at 665. In any event, VoIP gives competitors the ability to offer voice service along with their broadband service. Covad, for example, has recently announced a new "dedicated-loop ADSL" offering that, according to Covad, makes line sharing unnecessary by giving customers "the option to integrate VoIP directly onto the broadband line, relieving them of the need for traditional analog telephone service from the local voice provider."[247] The only thing that has changed is that providers such as Covad will no longer be permitted to offer their service as an add-on to incumbents' voice services in the absence of a voluntary commercial arrangement that is acceptable to both parties (just as they cannot offer broadband service as an add-on to cable's video service in the absence of a voluntary agreement). There is no definition of impairment that could include a competitor's inability to enter into a joint marketing arrangement with an unwilling partner.

In fact, competitors have recently begun to rely on full loops to offer broadband, just as the Commission predicted they would. Indeed, more CLEC broadband customers are served through whole-loop offerings than through line sharing.[248] Covad, for example, publicly touted

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[247] Covad Press Release, *Covad Launches Dedicated-Loop ADSL for Consumers and Small Businesses Nationwide* (July 6, 2004), *at* http://www.covad.com/companyinfo/pressroom/pr_2004/070604_news.shtml.

[248] *See, e.g.*, Ex Parte Letter from Susanne Guyer, Senior Vice President — Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, at 1-2, CC Docket Nos. 01-338, *et al.* (May 19, 2003) (documenting that, as of year-end 2002, in the Verizon-East region (*i.e.*, the former Bell Atlantic region), only 20 percent of CLEC DSL lines were provisioned using line sharing); *see also* Covad Press Release, *FCC Grandfathers Covad Line-Sharing Customers Indefinitely; Covad Continues Focus on Bundling and Small Business Based on FCC Ruling* (Aug. 22, 2003) ("Covad's business customers using dedicated lines account for about 60 percent of the company's revenues."); Charles Hoffman, President/CEO, Covad, Q2 2004 Covad Communications Earnings Conference Call — Final, FD (Fair Disclosure) Wire, Transcript